To Infinity and Beyond Immediate Parties: The Fourth and Ninth Circuit Split on the Enforceability of "Infinite Arbitration Clauses"

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Imagine walking into an AT&T store to sign up for a service plan and buy a new cellphone. Perhaps, you are excited to finally get your hands on the latest iPhone. At the same time your new phone is placed into one hand, a pen is placed into the other. You sign the dotted line at the bottom of the consumer service agreement. How carefully did you read the terms and conditions before you signed?

Did you intend to give up your rights to sue DIRECTV, a company who had no relationship to AT&T when you signed up for your cell phone plan? What effect does that customer service agreement have years later after you transferred your phone service to another provider and added your cellphone number to the National Do Not Call Registry? If you receive repeated and unsolicited calls, have you given up your rights to file or participate in a class action lawsuit against DIRECTV under the Telephone Consumer Protection Act ("TCPA")?

The answers may depend on where you live. Because, at some point after you signed your agreement with AT&T, DIRECTV became an AT&T affiliate and, under your service agreement, you agreed to arbitrate not only "all disputes and claims" between yourself and AT&T, but also between yourself and AT&T's "respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns."

This type of contract clause has been coined the "infinite arbitration" clause and recently led to a circuit split between the Fourth and Ninth Circuits.[i] The Fourth and Ninth Circuits heard facts that were almost identical to the hypothetical above and came to two different conclusions. The Fourth Circuit concluded that DIRECTV could compel arbitration as an affiliate of AT&T and that

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the plaintiff's TCPA claim fell within the scope of the arbitration clause. *Mey v. DIRECTV, LLC*, 2020 U.S. App. LEXIS 24993 (4th Cir. 2020). In contrast, the Ninth Circuit held that DIRECTV was unable to invoke the agreement to compel arbitration because it was not a party to the arbitration agreement. *Revitch v. DIRECTV, LLC,* 2020 U.S. App. LEXIS 31056 (9th Cir. 2020).

This Circuit conflict reflects an important dispute about the role and future of arbitration. And it is important to understand how the Fourth and Ninth Circuits reached such different holdings and the reasoning behind the rulings.

Fourth Circuit

In *Mey v. DIRECTV, LLC,* the Fourth Circuit disagreed with the plaintiff's argument that "affiliates" in AT&T Mobility's ("AT&T") service agreement was limited to affiliates existing at the time the contract was signed. Instead, the Court found that the agreement applied to DIRECTV, LLC ("DIRECTV"), a later acquired affiliate, because the agreement contained forward-looking provisions and language. Accordingly, the Court concluded that "it [was] unlikely the parties intended to restrict the covered entities to those existing at the time the agreement was signed. " *Mey*, 2020 U.S. App. LEXIS 24993, at *14.

In addition, the Fourth Circuit concluded that the plaintiff's TCPA claims were within the scope of the agreement because the "[t]he text of the agreement arguably contemplate[d] arbitration of [plaintiff's] claims, and any ambiguity about whether those claims [were] included 'must be resolved in favor of arbitration.'" *Id.* at *22 (quoting *Lamps Plus, Inc.*, 139 S. Ct. at 1418). In this regard, the court heavily relied on the Federal Arbitration Act's ("FAA") policy favoring arbitration.

As a final note in the majority's opinion, the Fourth Circuit acknowledged "that construing the broadest language of [the] arbitration agreement in the abstract could lead to troubling hypothetical scenarios." *Id.* at *22. However, the court declined to consider such hypotheticals because "the question before [the court] . . . [was] not abstract; it [was] tethered to the facts of this dispute and the categories of claims specifically included in [the] arbitration agreement." *Id.* (citing *Parm v. Bluestem Brands, Inc.*, 898 F.3d 869, 878 (8th Cir. 2018) (rejecting interpretation by hypothetical in favor of looking "to the underlying factual allegations [to] determine whether they fall within the scope of the arbitration clause")).

In her colorful dissent, Judge Harris disagreed with the majority's opinion. More specifically, Judge Harris stated that she would have affirmed the district court's holding—which denied DIRECTV's motion to compel arbitration—on the threshold question of contract formation. Judge Harris concluded that a reasonable and objective person would not have found the

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parties here agreed to arbitrate. In support of her conclusion, Judge Harris utilized hypotheticals —hypotheticals the majority specifically declined to address—to illustrate the potential consequences of enforcing AT&T's infinite arbitration clause.

In one example, Judge Harris discussed the possibility of a customer signing up for an AT&T cellphone service and later cancelling that contract the following year. Ten years later, this same customer is a federal judge and writes an opinion that someone at CNN does not like. To ruin the federal judge's reputation, CNN reports a story that the federal judge was "drunk on the bench during oral argument." *Id.* at *44. Naturally, the federal judge sues CNN for defamation. However, CNN objects to the federal judge's suit and seeks to compel arbitration because CNN's parent company, Time Warner, merged with AT&T after the judge ended her service agreement with AT&T. Under the terms of AT&T's arbitration agreement and, in accordance with the Fourth Circuit's holding, the judge would be obligated to arbitrate her defamation claim against CNN.

Judge Harris emphasized in her dissent that there is "nothing far-fetched" about the hypotheticals she described, "indeed, they are the straightforward result of DIRECTV's position in [the] case." *Id.* at *46. In fact, "at oral argument . . . DIRECTV embraced precisely these scenarios, insisting that they fell squarely within the hypothetical cell-phone customer's agreement to arbitrate with AT&T Mobility." *Id.*

Ninth Circuit

Alternatively, in *Revitch v. DIRECTV, LCC,* the Ninth Circuit came to the opposite conclusion as the Fourth Circuit and held that DIRECTV was unable to invoke the agreement to compel arbitration because it was not a party to the wireless services agreement between the plaintiff and AT&T. *Revitch v. DIRECTV, LLC,* 2020 U.S. App. LEXIS 31056 (9th Cir. 2020).

In support of its holding, the Ninth Circuit relied on California contract law which states that "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting." Cal. Civ. Code § 1636. California determines the mutual intention of the parties "from the written terms [of the contract] alone," so long as the "contract language is clear and explicit and does not lead to absurd results." *Id.* at *8. This is known as the "absurd results" rule. Under this rule, the Ninth Circuit concluded that interpreting "affiliates" in the consumer service agreement to include DIRECTV would lead to absurd results because the plaintiff "would be forced to arbitrate any dispute with any corporate entity that happens to be acquired by AT&T, Inc., even if neither the entity nor the dispute has anything to do with providing wireless services to [plaintiff]—and even if the entity becomes an affiliate years or even

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decades in the future." *Id.* at *9-10.

Interestingly, the Ninth Circuit acknowledged the Fourth Circuit's conflicting decision and recognized that it was creating a circuit split by issuing a contrary opinion. The Ninth Circuit noted that it disagreed with the Fourth Circuit's use of *Parm v. Bluestem Brands, Inc.* to refrain from examining "troubling hypothetical scenarios" that could arise under the broadest interpretation of the arbitration agreement. The Ninth Circuit interpreted the *Parm* case more narrowly and concluded that the issue in *Parm* was limited to whether the "plaintiffs' claims f[e] ll within the scope of [those] arbitration clauses." *Id.* ay *16 (quoting *Parm,* 898 F.3d at 871). However, the Ninth Circuit concluded that *Parm* was inapposite here because the issue presented to the Fourth and Ninth Circuits was not one of scope, but rather one of agreement formation.

In this regard, the Ninth Circuit disagreed with the Fourth Circuit and found that the use of hypotheticals was essential to "discern whether the mutual intent of the parties could have been to form an agreement to arbitrate any and all disputes that might ever arise between [the plaintiff] and yet-unknown affiliates such as DIRECTV." *Id.* at *17. The Ninth Circuit indirectly reaffirmed Judge Harris's use of hypotheticals and concluded "that the parties' intention—based on their reasonable expectations at the time of the contract—was *not* to form an arbitration agreement of the kind that DIRECTV" interpreted. *Id.* at *18.

Judge O'Scannlain went on to say in his concurrence that had the court concluded there was an agreement to arbitrate, he would have denied DIRECTV's motion to arbitrate under the issue of scope as well. According to Judge O'Scannlain, "[t]he dispute between DIRECTV and [the plaintiff] . . . simply [did] not 'aris[e] out of' [the plaintiff's] contract with AT&T," as he believes is required by the FAA.[ii] *Id.* at *18. In other words, Judge O'Scannlain found that the dispute at issue was "wholly unrelated to the contract in which the clause was contained" and therefore was outside the FAA. *Id.* at *23.

In his dissent, Judge Bennett disagreed with the majority and came to the same conclusions as the Fourth Circuit. More specifically, Judge Bennett found that the "arbitration clause's express terms encompass[ed] the parties' dispute" and that DIRECTV could compel arbitration because "affiliates" in the arbitration clause "clearly include[d] DIRECTV." *Id.* at *26.

In addition, Judge Bennett expressly rejected the majority's application of California's "absurd results" doctrine to the current issue because the doctrine applies if there is ambiguity and, according to Judge Bennett, "'affiliates' unambiguously includes DIRECTV." *Id.* at *32. Moreover,

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Judge Bennett found the majority's reliance on the doctrine problematic because the "Supreme Court has instructed that 'the FAA provides the default rule' in construing ambiguities about the scope of arbitration agreements and that [the court] must 'resolve[] [those ambiguities] in favor of arbitration.'" *Id.* at *33-34 (quoting *Lamps Plus,* 139 S. Ct. at 1418).

Conclusion

With the current circuit split regarding infinite arbitration clauses—*i.e.,* those clauses that broadly compel arbitration of "all disputes and claims" with an immediate party to the contract and any of its "subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns"—it may only be a matter of time before the issue is heard by the U.S. Supreme Court.

There is a fundamental question about how broadly Courts will allow arbitration agreements without limitations on the scope, parties, subject matter, or time. As this circuit split indicates, courts are struggling with the answer. In the meantime, these cases should serve as a reminder to anyone who drafts arbitration agreements to be sure that the arbitration term reflects the agreement the parties intend. And it should serve as a cautionary tale to all of us to make sure to review agreements we sign as consumers to see if they contain an infinite arbitration clause. Whether we intend to or not, we may be agreeing to arbitrate a dispute years later against a non-party, unrelated to the underlying agreement—at least if you live in Virginia, Maryland, West Virginia, or one of the Carolinas.

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[i] The Fourth Circuit issued its opinion on August 7, 2020 and the Ninth Circuit came to the opposite conclusion on September 30, 2020. *Mey v. DIRECTV, LLC*, 2020 U.S. App. LEXIS 24993 (4th Cir. 2020); *Revitch v. DIRECTV, LLC*, 2020 U.S. App. LEXIS 31056 (9th Cir. 2020).

[ii] Under the FAA, "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable . . . ." 9 U.S.C. § 2.

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